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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 423 - 424

LOWELL BERNHARDT and NATHANIEL AGNEW BOYD, alias Matt Boyd,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices:

Lowell Bernhardt and Nathaniel Agnew Boyd, pray for the issuance of a writ of certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit, entered September 27, 1948, in this cause, its numbers 10,652 and 10,653, affirming a judgment of the District Court of the United States for the Northern District of Ohio, Western Division.

Timely motion for re-hearing was filed in the Court of Appeals which was denied on October 20, 1948. The opinion of the Court of Appeals appears in the record herein, and is not yet reported.

QUESTIONS PRESENTED

1. Was the Verdict of the District Court erroneous in that the evidence adduced at the trial did not support the charge of a violation of Section 87 of Title 18, of the United States Code?
2. The verdict of the District Court on Criminal Information No. 9401, charging a violation of Title 18, Section 87 U. S. C. was error, in that said information and the one count thereof was duplicitous and the said Trial Court did not designate the specific crime he found had been committed by the appellants.
3. The verdict of the District Court on Criminal Information No. 9402, charging a violation of Title 18, Section 91 U. S. C. was error, in that the said court wrongly construed the Statute in question.
4. The verdict of the District Court was erroneous in finding the appellants guilty of a violation of Title 18, Section 87 U. S. C. under Criminal Information No. 9401 and at the same time finding the appellants guilty of a violation of Title 18, Section 91, U. S. C. under Criminal Information No. 9402 in that the charges in the said informations were repugnant to and antagonistic to each other and inconsistent with each other and the appellants could not have been guilty of both charges, by the commission of one act.

5. The verdict of the District Court was error in that it was a "general verdict" and failed to specify the count or offense on which it was founded, the appellants having been tried on charges radically different in nature and character.

STATUTES INVOLVED

The following Sections, Title 18, United States Code:

> "Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of any ordnance, arms, ammunition, clothing, subsistence, stores, money or other property furnished or to be used for the military or naval service, shall be punished, etc. * * *."

> "Whoever shall promise, offer to give any money or other thing of value * * * to any person acting for or on behalf of the United States in any official function, under or by authority of any department, or office of the Government thereof * * * with intent to influence his decision on any question, matter, cause or proceeding which may at any time be pending, or which may, by law be brought before him in his official capacity or in his place or trust or profit * * * shall be fined * * * etc."

JURISDICTION

This Court has jurisdiction under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Chapter 229, 43 Stat. 926), and under Rule 37(B) (2) of the Federal Rules of Criminal Procedure, and in conformity with Rule 38 of this Court, Section 5, sub-paragraph (b).

STATEMENT OF THE CASE

On November 25th, 1947, two informations in the District Court of the United States for the Northern District of Ohio, Western Division, charging the petitioners with violations of Sections 87 and 91 of the United States Code (R. 4, 5 and 6). Under Section 87, the petitioners were charged with stealing, embezzling and knowingly applying to their own use certain property and unlawfully conveying and disposing of same, said property being furnished to or to be used for the military or naval service. Under Section 91, they were charged with paying one Edwin H. Gust, the sum of Four Hundred Dollars to influence his decision as an employe of the Rossford Ordnance Depot of the United States Army.

Petitioners were arraigned and executed waivers of indictment (R. 2, 3, and 4), and pleas of not guilty were entered by petitioners. Petitioners waived trial by jury and the trial was conducted on January 12, 13, 14, and 26, 1948.

On January 26, 1948, petitioners were found guilty and sentenced to three years each on both charges, the sentences to be served concurrently. In addition each was sentenced to pay a fine of $1200.00 plus costs of $25.00 Bail was denied.

Edwin Harry Gust was the principal witness for the Government. He testified that he had been a defendant and had pleaded guilty (R. 31); that he was a civilian employe of the United States Army Ordnance Depot at Rossford, Ohio, and that his duties were largely paper work (R. 25, 26); that discrepancies have occurred between the records of surplus assets at the Depot and the records of the War Assets Administration at Detroit (R. 29); that shortly thereafter he made an arrangement

with the defendants, Boyd and Bernhardt, whereby; on the promise of certain remuneration, he would arrange payment and delivery to them of certain V-8 Ford starters (R. 26, 27), that he arranged all the details of the shipping at the Depot, and on instructions shipped certain V-8 starters, property of War Assets Administration through the Norwalk Truck Lines to the Essex Service, 5th Street, Detroit, Michigan (R. 2-27). His duties were those of a clerk connected with the handling of records of war surplus material (R. 26). He testified that he had been introduced to Mr. Boyd by his superior (R. 25, 26), and that he had handled all the arrangements, including the use of the shipping number (R. 27 and 28).

He further testified that he had called Boyd at Detroit from the Depot at Rossford giving him the details of the shipment (R. 28). On cross-examination he admitted that the call had been made in Toledo and not at the Depot (R. 29).

He said he met Boyd and Bernhardt in Toledo after the shipment and that he was paid $400.00 for his work as per their arrangements (R. 28).

Major Campbell testified as to the duties of the witness Gust at the Depot (R. 24, 25). He was an assistant supply clerk without supervisory, or executive responsibility (R. 24).

Another witness from War Assets testified that the number on the Shipping order used by Witness Gust had previously been assigned to a different Warehouse at Detroit, and was not assigned to the Rossford Depot (R. 34).

The defendants were questioned by F. B. I. agents and the agents testified to the conversations which were not incriminating (R. 35 to 39).

No attempts were made by the Government to have any of the defendants identified in Court directly and neither were identified except in the general terms defendants and were not pointed out by the Government or any of the witnesses.

Witness Gust's superior, Mr. Tappan was not a witness in Court, and there was testimony that Mr. Tappan was in charge at all times and that his duties had ever been performed by the witness Gust. Major Campbell testified that letters had been sent to the Essex Service and had been returned, but admitted later that he had not mailed them, but that they had been mailed by a clerk (R. 42). The clerk was not a witness.

A Government witness further testified that when the Army property was declared surplus, it then came under the control of the War Assets Administration was a separate and distinct division of the Government and the Army had no control over it (R. 28). The Witness Gust, it was testified was an employe of the Army and was not connected in any way with the War Assets administration (R. 28). The V-8 starters in question had been declared surplus and then taken by Gust and shipped to Essex Service (R. 33).

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

It is the contention of the petitioners that their prosecution on two separate informations were based on the same facts and the same evidence. They were charged and convicted of paying Four Hundred Dollars to Gust for stealing the starters and also for bribery on the same facts.

Petitioners contend that if they did pay the money, which they deny, for purchasing the stolen starters, how could the same payment be made into a charge of bribery.

The lower court denied the motion for a directed verdict and to dismiss (R. 47, 48, 49).

Petitioners also contend the charge of larceny, embezzlement, and knowing applied in one count was duplicitous (R. 4, 5); and, further, that Section 91 was wrongfully construed by the Court in that the facts showed no attempt to influence Gust in his official capacity, and the informations were repugnant and antagonistic to each other and one could not support the other.

Petitioners further contend that a general verdict by the Court was incorrect (R. 47, 48, 49).

CONCLUSION

Wherefore, it is submitted that this petition for allowance of a writ of certiorari should be granted.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The opinion of the Court of appeals appears in the Record and is not yet reported.

The questions presented, Statutes involved, Statement of Jurisdiction and of the Case, and Reasons relied upon, appear in the foregoing petition, and in the interest of brevity are not repeated here. The specification of Error are also in petition and are only repeated here as we argue each question.

ARGUMENT

I.

WAS THE VERDICT OF THE DISTRICT COURT ERRONEOUS IN THAT THE EVIDENCE ADDUCED AT THE TRIAL DID NOT SUPPORT THE CHARGE OF A VIOLATION OF SECTION 87 OF TITLE 18, OF THE UNITED STATES CODE?

With respect to Title 18 Section 87, we refer to the portion of the Section which reads: "furnished or to be used for the military or naval service." The testimony on this subject shows that the property claimed to have been stolen had been declared "surplus to the needs and responsibilities of the army" (R. 32, 33 and Exhibit 15). The property was under the control of War Assets and not of the Army. Gust was an employe of the Army, and was in no position to carry out the arrangements.

We urge the court that this situation is precisely analogous to that in the case of

O'Kelly v. United States, 116 Federal (2) 966, (8th Circuit, 1941)

in which case the interstate commerce nature of the shipment had been terminated by the consignee who broke the seal, removed part of the contents of the car and thereafter placed his own padlock on the door. In that case, the goods no longer retained the characteristic of being in interstate commerce; in our case, they no longer retain the characteristic of having been furnished or to be used for the military or naval service.

See also

United States v. Murphy, 9 Federal 26.

II.

THE VERDICT OF THE DISTRICT COURT ON CRIMINAL INFORMATION No. 9401, CHARGING A VIOLATION OF TITLE 18, SECTION 87 U. S. C. WAS ERROR, IN THAT SAID INFORMATION AND THE ONE COUNT THEREOF WAS DUPLICITOUS AND THE SAID TRIAL COURT DID NOT DESIGNATE THE SPECIFIC CRIME HE FOUND HAD BEEN COMMITTED BY THE APPELLANTS.

In

27 Amer. Juris. 683, Sec. 124

it is stated that "duplicity in criminal pleading is the joinder of two or more distinct and separate offenses in the same Count of an indictment or Information"; and further "the true reason seems to be that such joinder is improper, not because the offenses, and that here offenses apparently distinct, but arising under the same statute or out of the same transaction, and having the same punishments, are permitted to be embraced in the same count, it is because, in the circumstances of the case they constitute, in effect, only one offense" (citing *Crain v. U. S.*, 162 U. S. 625, 40 L. Ed. 1097; *Heiles v. U. S.*, 3 MacArth (DC) 370, 36 Am. Dec. 106).

In the case at bar the appellants were charged in the one count of Information No. 9401 with (1) larceny, (2) embezzlement, and (3) applying to their own use, (4) unlawfully conveying and disposing of merchandise unlawfully.

The distinction between larceny and embezzlement as two separate crimes, having different elements, is too elementary to require discussion herein.

In

Drier v. United States, 262 F. 407, (C. C. A. 5th C. 1919)

the Court said on page 408 that charge against a defendant of applying military property to his own use "is identical to a case of receiving stolen goods." That being the case, a third crime, made up of different elements, is here present.

The fourth crime of disposing of the goods would appear to possess different elements than all the rest and would be an alternative charge to "applying to his own use."

American Jurisprudence under the section above cited further states "It is a general rule that under the statutes that an indictment or Information is not duplicitous for alleging several different means or methods of committing the offense, provided there is no material repugnancy, or inconsistency in the means or methods used as where there is doubt as to which means or method was used in committing the offense or which produced the result upon which the criminal charge is based." (Citing *Anderson v. U. S.*, 170 U. S. 481, 42 L. Ed. 1116, 18 S. Ct. 689.)

It will suffice to say that the Government proof would necessarily vary in proving larceny as distinguished from embezzlement; and both larceny and embezzlement as dis-

tinguished from receiving stolen property or larceny by conversion; or in the final analysis, disposing of military property, which is a prohibition created by the statute.

When these appellants were forced to trial upon an Information covering all these charges in one count, they were, perforce, being subjected to a "shotgun" charge on the part of the prosecution and their constitutional rights to a fair and impartial trial, according to due process of law, were violated.

Argument might be advanced by the Government against this contention on the grounds that our objection to the Information comes too late. We believe that such argument would be baseless. In

Edwards v. United States, 266 Fed. 848

the Circuit Court in a carefully considered opinion, citing U. S. Supreme Court decisions, held that it was a proper question for consideration of the appellate tribunal and reversed the conviction on the count in question.

These appellants had a right to know the specific crime charged against them so that they could defend against it. A failure to properly inform them was a denial of due process which we urge, may be reviewed by this Court.

III.

THE VERDICT OF THE DISTRICT COURT ON CRIMINAL INFORMATION No. 9402, CHARGING A VIOLATION OF TITLE 18, SECTION 91 U. S. C. WAS ERROR, IN THAT THE SAID COURT WRONGLY CONSTRUED THE STATUTE IN QUESTION.

From the testimony as shown in the record, the property in question was the property of War Assets (R. 26). Gust, the government employee involved was a civilian employe of the United States Army (R. 25). He was in no position to be bribed in his official capacity as Section 91 provides for.

In this respect, the case differs not one bit from *United States v. Gibson,* 47 Federal 833, in which a United States revenue officer had the power to start a fire by reason of his presence in the distillery, as a revenue officer. He had no such duty or any related duty, and therefore the inducement of money or a promise of money to commit such an act, not related to his official duties, did not constitute a bribe.

We emphasize the position of the defendants that the act concerning which the bribe is given or promises must be one that performance or non-performance of which is directly related to the briber's duties. The purpose of the bribe must be to obtain the performance or omission of a legal function in an illegal manner. In every instance and case, which we have examined, there was some lawful duty of the employee which was involved and the decision of the court was related to the presence or absence of such legal duty.

It is the existence of the legal duty and not its importance or paramount position by which the question of bribery is to be judged, and with respect to this characteristic, the case of *United States v. Sears,* 264 Federal 256 (First

Circuit, 1920) is particularly pointed. In that case the inspection was merely a preliminary one. The same factor was involved in the case of *Browne v. United States,* 290 Federal 870 (Sixth Circuit, 1923) in which case our Circuit Court found that the bribe was given to secure a recommendation from the lieutenant, who had no higher authority than of making recommendations; but the evidence was to the effect that making recommendations was a lawful duty of the lieutenant.

See also

Thomson v. U. S., 37 App. P. C. 461;
In re: Ye Coe, 83 Fed. 145; and
United States v. Boyer, 85 Fed. 426.

In the case of

Krichman v. United States, 256 U. S. 363

the Court held that the bribery statute could not be enlarged to include an attempt to bribe a baggage porter on a railroad while the railroads were under the control of the United States during the First World War. At the bottom of page 365 the Court says:

> "The point to be decided depends upon whether, when the bribe was offered to the porter, he was acting for the United States in an official function. The decided cases do not afford much aid in reaching a solution of this problem, * * *.
>
> "The act aims to punish the attempted bribery or bribery of officials and those exercising official functions under or by the authority of a department or office of the government. Not every person performing any service for the government, however humble, is embraced within the terms of the statute. It includes those, not officers, who are performing duties of an official character. As was well sug-

gested by Judge Ward in his dissenting opinion in the circuit court of appeals, not every employee of the government is covered by the act, but a limitation is made, applying to those *acting* in official functions. And he added: 'The construction adopted by the court, gives those words no meaning. They might as well, or indeed better, have been omitted, because window-cleaners, scrub women, elevator boys, doorkeepers, pages—in short, anyone employed by the United States to do anything, —is included.' * * *

"The government admits that the statute is ambiguous. While criminal statutes are to be given a reasonable construction, ambiguities are not to be solved so as to embrace offenses not clearly within the law. We are unable to remedy the uncertainties of this statute by attributing to Congress an intention to include a baggage porter with those who discharge official duties in the operation of a railroad controlled by an officer of the government.

"It follows that the judgment of the Circuit Court of Appeals must be reversed."

In summary, on this question, it is the contention of the defendants, that Section 91 of Title 18 does not encompass the fact situation where an inducement or payment is to an employee of the War Department for the purpose of having his initiate removal of surplus goods from a warehouse and for the purpose of having him make a shipment of such goods, because the nature of his duties is such that he has no such power or capacity except upon receipt of orders from the War Assets Administration, and because the goods had been declared to be surplus to the needs of the War Department, and were therefore subject entirely to the control in their care, handling, and disposition to an arm of the government completely separated from that of which he was an employee. See also *U. S. v. Birdsall*, 233 U. S. 223.

IV.

THE VERDICT OF THE DISTRICT COURT WAS ERRONEOUS IN FINDING THE APPELLANTS GUILTY OF A VIOLATION OF TITLE 18, SECTION 87 U. S. C. UNDER CRIMINAL INFORMATION No. 9401 AND AT THE SAME TIME FINDING THE APPELLANTS GUILTY OF A VIOLATION OF TITLE 18, SECTION 91, U. S. C. UNDER CRIMINAL INFORMATION No. 9402, IN THAT THE CHARGES IN THE SAID INFORMATIONS WERE REPUGNANT TO AND ANTAGONISTIC TO EACH OTHER AND INCONSISTENT WITH EACH OTHER AND THE APPELLANTS COULD NOT HAVE BEEN GUILTY OF BOTH CHARGES, BY THE COMMISSION OF ONE ACT.

V.

THE VERDICT OF THE DISTRICT COURT WAS ERROR IN THAT IT WAS A "GENERAL VERDICT" AND FAILED TO SPECIFY THE COUNT OR OFFENSE ON WHICH IT WAS FOUNDED, THE APPELLANTS HAVING BEEN TRIED ON CHARGES RADICALLY DIFFERENT IN NATURE AND CHARACTER.

For the purpose of this discussion the above points have been consolidated to avoid repetition.

We have already referred to the duplicitous nature of the count contained in Criminal Information No. 9401, charging a violation of Section 37, Title 18, U. S. C.

We now urge that the verdict of the Trial Court heightened rather than lessened the prejudice to the appellants' rights, for by such verdict the appellants were found guilty of stealing or embezzling property or knowingly receiving it after it was stolen while at the same time being adjudged guilty of bribing a Government agent with intent to influence him in a matter coming before him in his official capacity.

A fortiori the alleged violations of Section 87 and the alleged violation of Section 91 (both cited *supra*) are repugnant and antagonistic to, and inconsistent with each other. This repugnancy, antagonism and inconsistency arises out of the intent that must be shown to sustain each violation.

If it was the intent of the appellants to steal or embezzle then they became accomplices with the actual thief, Gust, and the intent of all three grew out of an unlawful agreement and conspiracy in which all joined, the act of one becoming the act of the other.

But such an intent could not have existed if the appellants were guilty of a violation of Section 91, for in that instance their specific intent was to influence Gust by a bribe and of necessity the appellants themselves were the accomplices and the intent of both grew out of an unlawful agreement and conspiracy in which the appellants alone joined, Gust being excluded. This unlawful agreement was to bribe Gust, and Gust did not enter in the picture until the appellants themselves were in accord. Gust reasonably could not have been part of the original agreement in bribe, since a person cannot agree or conspire to bribe himself. There can be no conspiracy to bribe between bribe-givers and bribe-receivers.

See

Wharton Criminal Law (12th Ed.), Vol. II;
United States v. Sager, 49 F. (2d) 725 (CCA2C),
Sec. 1604.

If it was the intent of the appellants to apply the property to their own use, or as judicially determined, to receive stolen property, then under the facts in this case, any intent to bribe a government agent, acting in an official

capacity was negatived, for the appellants were then entering into an agreement with a common thief to receive the products of his pilfering.

By the same token, an intent to influence a Government agent, acting as such, by a bribe would negative a prior knowledge that the merchandise was stolen or was to be stolen by him.

In view of the repugnancy inherent between a violation of Section 87 and a violation of Section 91, we contend a verdict finding defendants guilty of both was erroneous.

Appellants further urge that such a verdict on two charges, radically different in character and nature, without specifying on what count or offense it is founded, is a "general verdict" and therefore void for uncertainty and fatally inconsistent.

In

Soper v. United States, 27 F. (2d) 648 (C. C. A. 9th C. 1928)

the jury returned a verdict finding the defendant guilty of two distinct charges of possession, one for the possession of property intended to be used to violate the National Prohibition Act, and the other for possession of intoxicating liquor. The Court said it was more probable from the record that it was more probable that the jury referred to the liquor count, but that legally it was not known or ascertainable. The Court further said "Upon the fact of the judgment roll, one view is as reasonable as the other, and should this defendant in the future be charged with a second offense for possession of property or of liquor, this record could in either case be brought forward in support of the allegation of a former conviction." The Court reversed Soper's conviction.

CONCLUSION

Wherefore, it is submitted that the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 423 and 424

LOWELL BERNHARDT AND NATHANIEL AGNEW BOYD, ALIAS MATT BOYD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (R. 52-54) is reported at 169 F. 2d 983.

JURISDICTION

The judgments of the Court of Appeals were entered September 27, 1948 (R. 51), and a petition for rehearing was denied October 20, 1948 (R. 54). The petition for writs of certiorari was filed November 16, 1948. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to show that the property, allegedly stolen by petitioners, was "property furnished or to be used for the military or naval service" within the meaning of Sec. 36 of the Criminal Code, 18 U.S.C. (1946 ed.) 87 (now 18 U.S.C. 641).

2. Whether the duplicity of the first information constitutes reversible error.

3. Whether there was sufficient evidence to show that the federal employee, allegedly bribed by petitioners, was acting "in his official capacity" within the meaning of Sec. 39 of the Criminal Code, 18 U.S.C. (1946 ed.) 91 (now 18 U.S.C. 201).

4. Whether the trial court's finding that petitioners were guilty as charged was a finding that they were guilty of crimes which were inconsistent with, and repugnant to, each other.

STATUTES INVOLVED

Section 36 of the Criminal Code, as amended, 18 U.S.C. (1946 ed.) 87 (now 18 U.S.C. 641), provided:

> Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of any ordnance, arms, ammunition, clothing, subsistence, stores, money, or other property furnished or to be used for the military or naval service, shall be punished as prescribed in section 35(C) of the Criminal Code (U.S.C., title 18, sec. 82).

Section 39 of the Criminal Code, 18 U.S.C. (1946 ed.) 91 (now 18 U.S.C. 201), provided in pertinent part:

> Whoever shall promise, offer or give, or cause or procure to be promised, offered, or given, any money or other thing of value, * * * to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, * * * with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made, or tendered, and imprisoned not more than three years.

STATEMENT

After petitioners had waived indictment (R. 2-4), two informations were filed against them and Edwin Gust in the District Court for the Northern District of Ohio. The first information (No.

9401) charged that the three defendants did "steal, embezzle or knowingly apply to their own use and did unlawfully convey and dispose of certain property furnished to or to be used for the military or naval service," to wit, 800 automobile starters valued at $11,400 (R. 4-5). The second information (No. 9402) alleged that Gust was an employee of the United States and that petitioners gave him $400 with intent to influence his action in a matter under his control in his official capacity, and thereby caused him to ship the 800 automobile starters to a point beyond the control of the United States, thus defrauding it of the sum of $11,400 (R. 5-6).

Gust pleaded guilty (R. 7). Petitioners waived a jury trial (R. 7-8). After a trial before the court, petitioners were found guilty as charged, January 26, and were at once orally sentenced to three years' imprisonment on each information, the terms to be served concurrently; in addition they were fined $1200 on the bribery charge (R. 10, 43, 47, 49). On the same day the court filed written judgments reciting that petitioners were convicted of theft of government property under the first information and of bribery under the second information (R. 10-14). The judgments were affirmed on appeal (R. 51).

The evidence for the Government, in so far as pertinent to the issues raised by the petition for

writs of certiorari, may briefly be summarized as follows:

The 800 automobile starters, allegedly stolen by petitioners, were originally used for military purposes by the War Department and stored at the Rossford Ordnance Depot in Wood County, Ohio (R. 22, 23, 24, 33). The War Department had reported them to the War Assets Administration as surplus property (R. 24), and they had been offered for sale by War Assets to buyers having a priority rating (R. 33). The army officers in charge of the depot were, however, still responsible for them until such time as they were shipped from the depot pursuant to an order from War Assets (R. 24).

Gust was Assistant Chief of the Surplus Property Branch at the depot (R. 21, 26). In the absence of his chief he had authority over the receipt, storage and shipment of surplus property at the depot and could order property shipped from the depot pursuant to sale by the War Assets (R. 21-22, 26).

Petitioners were heavy buyers of surplus material at the depot through War Assets, and Gust had met them in the course of his official business (R. 22, 23, 25-26). Petitioners suggested to Gust that "it was possible to get some of the material out of there without going through War Assets or, off the record, make some easy money" (R. 26). Gust knew that War Assets had no record of certain

property at the depot which had been declared surplus by the War Department (R. 29), and he gave petitioners a list of items, including the starters, which he could ship out of the depot without anyone knowing it (R. 26, 29-30). Petitioners told Gust that they would pay him $400 to ship the starters to them and they gave him a shipping address in Detroit (R. 26-27, 30). Gust, in the absence of his chief, wrote an order directing delivery of the starters to the address in Detroit; this order he gave to a clerk to write up and as a result the starters were eventually delivered by truck in Detroit (R. 27, 29, 32). The driver of the truck was met in front of the shipping address by a man who took him to a warehouse in the next block, had him deliver the starters there, and gave him a receipt signed "S. Swagort" (R. 34-35). Petitioners paid Gust $400 after the delivery (R. 28). There was evidence that the signature "S. Swagort" had been written by petitioner Boyd and that some of the boxes used to ship the starters were later found in petitioners' warehouse (R. 35-42).

Petitioners moved for judgments of acquittal at the close of the Government's case. The motion was overruled and petitioners did not take the stand or offer any evidence in their own behalf. (R. 43.)

ARGUMENT

1. Petitioners contend (Pet. 9-10) that there was no evidence to support their convictions upon the

first information, which charged them with theft of property furnished for military service, for the reason that the testimony showed that the starters, having been declared surplus, had passed from the control of the army to the control of the War Assets Administration. But it is undisputed that the starters were furnished for military purposes (R. 23), and the executive officer of the depot testified that the Army was responsible for them as long as they were physically present on the premises (R. 24). This was in accordance with the terms of the Surplus Property Act, which provides (50 U.S.C. App. 1620(d))[1] that under certain circumstances the responsibility for the "care and handling" of surplus property shall not pass to the disposal agency pending its disposition. We think it clear that the starters would not have lost their character as property "furnished for the military service" until title had passed from the United States or the Army had been relieved of responsibility for them. The cases cited by petitioners to support their contention are not in point. *United States* v. *Murphy,* 9 Fed. 26 (C.C. S.D. Ohio), involved clothing issued to inmates of the National Military Home who were not in the military serv-

[1] "* * * Where the disposal agency is not prepared at the time of its designation * * * to undertake the care and handling of such surplus property the Surplus Property Administrator may postpone the responsibility of the agency to assume its duty for care and handling for such period as he deems necessary to permit the preparation of the agency therefor."

ice. In *O'Kelley* v. *United States,* 116 F. 2d 966 (C.C.A. 8), goods allegedly stolen from an interstate shipment had lost their interstate character because delivery to the consignee had already been accomplished.

2. The first information charged petitioners in the disjunctive with crimes involving inconsistent elements—theft or embezzlement[2] (*supra,* p. 4). But petitioners failed to make any complaint on this score at any stage of the trial proceedings, and the objection (Pet. 10-12) is obviously too late. If petitioners had felt themselves handicapped in preparing a defense they could have moved in the trial court that the Government be required to elect which theory it desired to adopt, and the information could then have been amended. See Rule 7(e), F. R. Crim. P. But the defect is a technical one which is cured by verdict if not previously attacked by motion. *Wiborg* v. *United States,* 163 U. S. 632, 646-648; *Durland* v. *United States,* 161 U. S. 306, 315; *Beauchamp* v. *United States,* 154 F. 2d 413, 415 (C.C.A. 6), certiorari denied, 329 U. S. 723; *Yates* v. *United States,* 151 F. 2d 580, 581 (C.C.A. 9). *Edwards* v. *United States,* 266 Fed. 848 (C.C.A. 4), cited by petitioners for the proposition that the objection can be raised in the appellate courts, is not in point, for the indictment in that case failed to state any offense sufficiently. Peti-

[2] It should be noted that the opinion of the court below mistakenly states that it was the second information which laid this charge (R. 53).

tioners make no showing that their defense was in the least prejudiced by the duplicity. Nor were they injured by the fact that they were found "guilty as charged," for the written judgment filed the same day that they were pronounced guilty (*supra*, p. 4) made it clear that they had been convicted of theft alone under the first information.

3. Petitioners contend (Pet. 13-15) that their conviction under the second information cannot be sustained for the reason that the evidence did not establish that Gust was acting "in his official capacity," within the meaning of the bribery statute, in shipping the starters to them. They argue that the "care, handling and disposition" of the starters had passed to War Assets and that Gust, an employee of the War Department, had no authority over them. But this ignores the fact that under the Surplus Property Act the "care and handling" of the property may remain in the Army pending disposition by War Assets (*supra*, p. 7), and it ignores the evidence that the Army was still responsible for the care and handling of the starters (*supra*, p. 5) and that Gust, in the absence of his superior, had authority to do just what he did, *i.e.*, to order them shipped out of the depot (*supra*, p. 5). We submit that Gust clearly had an official function to perform in respect of this property, and that the case is therefore governed by *United States* v. *Birdsall*, 233 U. S. 223, in which the defendant was convicted of bribing employees of the

Interior Department "with intent to influence their official action so that they would advise the Commissioner of Indian Affairs, contrary to the truth, that upon facts officially known to them leniency should be granted" to persons who had been convicted of selling liquor to Indians. Gust's position is obviously distinguishable from that of the baggage porter in *Krichman* v. *United States*, 256 U. S. 363, relied upon by petitioners, for the porter was merely an employee of the Pennsylvania Railroad at a time when it was being operated by the Government and he had no official authority whatever over certain trunks which he was bribed to deliver to the defendant.[3]

4. We fail to perceive any merit in petitioners' contention (Pet. 16-18) that they were convicted of repugnant offenses. As the Court of Appeals pointed out (R. 53), the bribery here was designed to facilitate the theft. Gust was bribed to exercise his official position in such a manner as to enable petitioners to steal the surplus starters. Furthermore, there was abundant evidence to support the conviction under the bribery information, and since the lesser penalty inflicted under the theft information was made to run concurrently with the

[3] Similarly, the instant case is readily distinguishable from *Blunden* v. *United States*, 169 F. 2d 991, decided at about the same time by another panel of the Court of Appeals for the Sixth Circuit. In the *Blunden* case, the government employee allegedly bribed had no authority to deliver surplus property outside the depot; furthermore, he delivered non-surplus property on the representation that it was surplus.

heavier penalty for bribery, the asserted repugnance is immaterial.

The trial court's finding of guilty as charged was not, as petitioners assert (Pet. 18), a "general verdict," leaving it uncertain of which offense they had been convicted. The record makes it clear that they were found guilty and sentenced under both the theft information and the bribery information (R. 10-14, 47, 49).

CONCLUSION

The decision of the Court of Appeals is correct and no conflict of decisions is involved. We therefore respectfully submit that the petition for writs of certiorari should be denied.

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